

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
:  
D. JOSEPH KURTZ, :  
:  
Plaintiff, : 14-CV-1142 (JBW)  
:  
v. : 225 Cadman Plaza East  
:  
KIMBERLY-CLARK CORPORATION, :  
et al., :  
:  
Defendants. : May 29, 2015  
:  
-----X  
ANTHONY BELFIORE, :  
:  
Plaintiff, : 14-CV-4090 (JBW)  
:  
v. :  
:  
THE PROCTER AND GAMBLE COMPANY, :  
:  
Defendants. :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE  
BEFORE THE HONORABLE ROBERT M. LEVY  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: MARK S. REICH, ESQ.  
Robbins Geller Rudman & Dowd, LLP  
58 South Service Road, Suite 200  
Melville, New York 11747  
  
LESTER L. LEVY, ESQ.  
Wolf, Popper, LLP  
845 Third Avenue, 12<sup>th</sup> Floor  
New York, New York 10022

(Appearances continue on next page.)

Proceedings recorded by electronic sound recording, transcript  
produced by transcription service

1

2

2

3 APPEARANCES CONTINUED:

4

For the Defendants:

EAMON PAUL JOYCE, ESQ.  
Sidley Austin LLP  
787 Seventh Avenue  
New York, New York 10019

5

6

7

JAMES M. BERGIN, ESQ.  
Morrison & Foerster  
250 West 55th Street  
New York, New York 10019

8

9

10

EMILY HENN, ESQ.  
Covington & Burling LLP  
333 Twin Dolphin Drive, Suite 700  
Redwood Shores, California 94065

11

12

13 Court Transcriber:

SHARI RIEMER, CET-805  
TypeWrite Word Processing Service  
211 N. Milton Road  
Saratoga Springs, New York 12866

14

15

16

17

18

19

20

21

22

23

24

25

1 (Proceedings began at 2:33 p.m.)

2 THE COURT: Are we ready?

3 Good afternoon. This is Judge Levy. Is everybody  
4 on the line?

5 MR. LEVY: Yes, Your Honor.

6 THE COURT: So let me call the case. We're on the  
7 record. We're here on Kurtz and Belfiore, 14-CV-1142 and 14-  
8 CV-4090 respectively.

9 Would counsel for plaintiffs in Belfiore please  
10 state their appearances for the record.

11 MR. LEVY: Good afternoon, Your Honor. Lester Levy  
12 from the Wolf Popper firm.

13 THE COURT: And defendants.

14 MS. HENN: Good afternoon, Your Honor. Emily Henn  
15 from Covington & Burling for Proctor & Gamble.

16 THE COURT: And in the Kurtz case, plaintiff's  
17 counsel, please.

18 MR. REICH: Mark Reich with Robbins Geller for  
19 plaintiff Kurtz and with me is Vince Serra.

20 THE COURT: For defendants.

21 MR. JOYCE: You Eamon Joyce from Sidley Austin on  
22 behalf of Kimberly-Clark.

23 MR. BERGIN: Also James Bergin from Morrison &  
24 Foerster with my colleague Kayvan Sadeghi for Costco.

25 THE COURT: So I think the hardest issue we're going

1 to deal with today is scheduling and I'd like to do that first  
2 and hopefully it will work out for as many of you as possible.

3 I take it -- the first -- I spent some time with  
4 Judge Weinstein's chambers trying to find days that work for  
5 both of us. We both have trials on the week of July 13th  
6 which has been causing a bit of I think a problem because it  
7 seems to be a good week for many of you.

8 So in the month of June of the dates that Judge  
9 Weinstein and I have proposed, is there any date that works  
10 for all of you? Why don't we just start with the parties in  
11 the Belfiore case.

12 MR. LEVY: For the plaintiff, I think any date --  
13 those dates in June work.

14 THE COURT: Okay. And for defendants.

15 MS. HENN: Your Honor, this is Emily Henn. The date  
16 the week of June 22nd conflicts with my planned vacation which  
17 we had mentioned in the last hearing when we first selected  
18 the date. I believe the third date in June -- no, that's the  
19 conflict for the dates in June.

20 THE COURT: So is there a date that works for you in  
21 June?

22 MS. HENN: The original scheduled date for science  
23 day was June 19th and I think that works for defendants. It  
24 was plaintiffs that sought to move it from that date because  
25 of a third party witness unavailability issue.

1 THE COURT: Right. So getting back to the plaintiffs  
2 on that. Is June 19th still not a good date?

3 MR. REICH: Matt, are you on the phone?

4 MALE VOICE: The third party is still unavailable on  
5 that date. He will be speaking at a conference.

6 MR. JOYCE: If I may, Judge Levy. This is Eamon  
7 Joyce on behalf of Kimberly-Clark.

8 THE COURT: Yes.

9 MR. JOYCE: Mr. Valet is speaking on a panel from  
10 eight a.m. until ten a.m. He's the third of the four  
11 speakers. Even if he stays until the end he can get on a  
12 11:45 flight and be at LaGuardia to by two. If you or Judge  
13 Weinstein have time that afternoon we could take him that  
14 afternoon and break up the hearing a little bit.

15 MR. LEVY: I don't think that works. Mr. Valet  
16 has -- first he's got to prepare and second, he's got  
17 equipment that has to be set up in the courtroom.

18 THE COURT: What kind of equipment?

19 MR. LEVY: I don't think it's going to work.

20 THE COURT: What kind of equipment does he need?

21 MR. LEVY: He has testing equipment. He tests these  
22 products and there will be a demonstration to show that these  
23 products don't break down and don't flush in the real world.  
24 So he's going to bring some equipment into the courtroom to  
25 show that.

1           MR. JOYCE: [Inaudible] hundreds of videos that he  
2 has online, Mr. Levy? I mean he's done this over and over  
3 again online. We've all watched these videos.

4           THE COURT: Tell me about the equipment. Is it large  
5 or is it small handheld equipment?

6           MR. LEVY: It's -- some of it is fairly large. Mark  
7 and --

8           MR. REICH: This is Mark Reich, Your Honor. I can  
9 speak to that. The equipment is not handheld. In fact, we're  
10 going to have to work things out I guess with the Marshal's  
11 Office or with security of the court to figure out how we're  
12 going to get it into the building and utilize it. So it's  
13 certainly not going to be an easy task and certainly not  
14 something he can set up very quickly.

15           In responding to the suggestion by Kimberly-Clark's  
16 counsel it's a nice idea but again this is a third party that  
17 we're dealing with and we're asking for him to rush around  
18 flights in order to make it and if there's a one hour or two  
19 hour delay which is pretty common then the entire plan is  
20 really for naught. So I don't think that's something that we  
21 would agree to on the court side.

22           THE COURT: Where is he coming from?

23           MR. REICH: I believe he's coming from Atlanta.

24           THE COURT: Right. That's what I recall. Okay.

25           So let's just say for the moment that June doesn't

1 look good. The week of July 13th is not good for me and Judge  
2 Weinstein. We both have trials that week. I think the next  
3 date that we suggested was the 21st.

4 MR. JOYCE: If I may, Your Honor. This is Eamon  
5 Joyce again. Both myself and my witness scheduled our  
6 vacations around the original setting. So I'm going the week  
7 of July 20th and more significantly David Powling [Ph.] who's  
8 the 30(b)(6) in this case would disclose and in fact was  
9 deposed at length is gone from July 16th through August 3rd.

10 THE COURT: Okay. So basically between our trials  
11 and those vacation schedules the only time that works is the  
12 week after July 4th and that doesn't work for the court.

13 MR. JOYCE: If I may, Your Honor.

14 THE COURT: Sure.

15 MR. JOYCE: We had one item on the Kimberly-Clark  
16 side. Back when we were initially discussing these issues  
17 with Mr. Reich, and we are just talking about defendant's lack  
18 of availability after Mr. Levy had filed his letter on the  
19 adjournment, I think Mr. Reich had raised the idea that  
20 perhaps just Mr. Valet could testify on a different day. From  
21 our perspective, at least Kimberly-Clark's perspective we  
22 could live with that. It wouldn't be optimal insofar as I  
23 wouldn't -- I wouldn't probably be in the courtroom and Mr.  
24 Powling wouldn't be in the courtroom but I could have somebody  
25 else from my team cover that and we could try to find in-house

1 counsel on the Kimberly-Clark side with knowledge of these  
2 materials.

3           So I would think one possible avenue that if we're  
4 trending in this direction is to try to keep June 19th for  
5 everybody else because we know everybody is available then and  
6 then it just gets as we've discussed really messy thereafter  
7 and so assuming everyone else could do -- I think the date is  
8 July 21st which is a date I'd be unavailable and Mr. Powling  
9 would be unavailable, I'd have co-counsel come and cover that  
10 for Valet.

11           THE COURT: I think you would be a good mediator.

12           Does anyone have an objection to that?

13           MR. REICH: This is Mark Reich. I can only speak  
14 for the Kurtz side because this is not something that we  
15 discussed heavily on the global plaintiff's side but it's a  
16 good notion because it will allow things to move along. The  
17 only question would be whether or not plaintiffs would put  
18 anybody forward on the June 19th day because we would want to  
19 discuss whether or not it made sense for both of our witnesses  
20 to be on the same day as opposed to breaking the two of them  
21 up and that's something I -- like I said, I have not spoken  
22 with Mr. Levy about.

23           MS. HENN: This is Emily Henn for Proctor & Gamble.  
24 My company witness, similar to Kimberly-Clark's company  
25 witness, is not available on the later date, July 21st, and



1 while I have discussed with my clients the possibility of  
2 having Valet only day that day I think that we would have an  
3 objection to both of plaintiff's witnesses going on a later  
4 different day on which when my client's witness couldn't be  
5 there to participate and watch.

6 THE COURT: Okay. Well, I like the suggestion and I  
7 think the Valet only day is probably the best way to handle  
8 it. I think it mediates between the pros and cons for both  
9 sides of the various dates. Since there's no perfect date I  
10 think that's probably the best thing we can do. I have 15  
11 conferences to adjourn that day. I think we'll have a lot of  
12 people that will be unhappy on the 21st but I'm willing to do  
13 it and Judge Weinstein is willing to do it. So I think that's  
14 the solution then.

15 MR. JOYCE: So when would the second day be, July 21?

16 THE COURT: It would be 21 and I think on -- let me  
17 just ask Karen. Judge Weinstein and I are free from 10:30 on.  
18 If you prefer to make it an afternoon or morning -- how long  
19 is Mr. Valet going to take?

20 MR. JOYCE: We don't know at this point. We have to  
21 speak to him.

22 THE COURT: Does it make sense to just -- or do you  
23 know that he is available that date or are you not sure?

24 MR. JOYCE: I'm not even sure he's available that  
25 day. Mark, do you know?

1 MR. REICH: I'm checking.

2 MS. HENN: This is July 21st at 10:30?

3 THE COURT: Yes. Or it could be in the afternoon too  
4 for those of you coming from afar, whichever works. We're  
5 free from -- we can be free from 10:30 on. We can make it  
6 either at 10:30 or at 2:00 for example, 1:00. Whatever time  
7 you want to make it.

8 MS. HENN: Your Honor, this is Emily Henn again for  
9 Proctor & Gamble. The rest of the hearing would revert to the  
10 originally scheduled date of June 19th?

11 THE COURT: Yes.

12 MS. HENN: Am I understanding that correctly? Okay.

13 MR. LEVY: Your Honor, while we're waiting to find  
14 out Valet's availability, this is Lester Levy at Wolf Popper.  
15 Mr. Belfiore, I can't imagine him participating in science day  
16 when we're talking about the defendant's presentation of how  
17 these are manufactured and how they work or don't work. I was  
18 wondering whether he -- Mr. Belfiore can be excused from  
19 attending science day.

20 THE COURT: That's fine with me. I don't think Judge  
21 Weinstein would have a view on that.

22 MR. LEVY: He didn't. It is in his order. I think  
23 [inaudible] plaintiffs on the phone but I can't imagine  
24 hanging on the phone for four hours [inaudible].

25 THE COURT: It might be -- Judge Weinstein often does

1 like to do a little fact finding or at least a little  
2 investigation at the -- if he would be available by phone I  
3 think that would probably work. He doesn't have to --

4 MR. LEVY: You'd be a good mediator yourself.

5 THE COURT: So let's try that.

6 MR. LEVY: Okay.

7 THE COURT: We also have to find another date for the  
8 class certification argument. Does the 21st -- one thought  
9 would be -- I don't know if it -- do we need a separation from  
10 a science day too and the class cert hearing or just from  
11 science day one and --

12 MR. LEVY: That would be up to Judge Weinstein but if  
13 we did Valet in the morning of the 21st we might be able to  
14 have the class in the afternoon.

15 THE COURT: Right. That's what I was thinking.

16 MR. JOYCE: Judge Levy, unfortunately that's where  
17 you end up losing me.

18 THE COURT: Right. I forgot. Sorry.

19 MR. JOYCE: My client is perfectly happy having co-  
20 counsel cover Valet but I've been the one involved in class  
21 cert and so --

22 THE COURT: Of course.

23 MR. JOYCE: -- I would ask that that occur while I  
24 was available.

25 THE COURT: Okay. So do you want to pick another

1 day?

2 MR. JOYCE: I can tell you from my perspective I  
3 don't -- assuming Judge Weinstein doesn't need -- having just  
4 seen David Powling on June 19th assuming Judge Weinstein  
5 doesn't need my witness back again on the class cert hearing  
6 day I'm free that entire next week. I'd request that it not  
7 be the 27th because I get back to New York late on the 26th  
8 but any other day the week of the 27th would be fine for me.  
9 I don't know how that lines up with other people.

10 MR. LEVY: For plaintiff in the Belfiore case, it's  
11 -- I'm available that week.

12 MS. HENN: For Proctor & Gamble we are also available  
13 that week.

14 THE COURT: I'm just told that that week may not be  
15 so good. We're looking at the week of August 10th or August  
16 17th. Either of those weeks, do you have availability any  
17 days those weeks?

18 MR. BERGIN: James Bergin for Costco. The week of  
19 August 10th is better for us than the 17th but we can make the  
20 17th, the week of the 17th work if necessary.

21 THE COURT: How is the week of the 10th for others?

22 MALE VOICE: For [inaudible] it works for us.

23 MR. LEVY: It works for plaintiffs.

24 MS. HENN: Pardon me. This is Emily Henn for Proctor  
25 & Gamble. The beginning of that week is good. On Thursday I

1 have a court hearing in California, Thursday the 13th of  
2 August but if that's the only day that works for the court I  
3 can probably have a colleague attend it.

4 MR. JOYCE: For Kimberly-Clark both of those weeks  
5 look good for me.

6 THE COURT: Is the 12th -- Ms. Henn, is the 12th a  
7 little too tight for you or would the 12th work?

8 MS. HENN: The 12th would work. I could slide back  
9 [inaudible] problem.

10 THE COURT: Let's make it the 12th.

11 [Pause in proceedings.]

12 THE COURT: Again, I think we can choose any time on  
13 the 12th if that works for all of you. Is the morning better  
14 than the afternoon or does it matter? I assume it's probably  
15 better for Ms. Henn to do it in the morning or not?

16 MS. HENN: Yes, Your Honor, the morning or early  
17 afternoon. Either would be fine.

18 MR. JOYCE: Morning is fine by me. Kimberly-Clark.

19 MR. BERGIN: Morning is fine for Costco.

20 THE COURT: So why don't we make it 10:30. 10:30 on  
21 August 12th. Excellent. Now we just have to hope that Mr.  
22 Valet works.

23 Anything else on scheduling?

24 When will we hear from Mr. Valet? Do you think it's  
25 possible to reach him today or do wait until Monday?

1 MR. REICH: Vince Serra from my office, this is Mark  
2 Reich speaking, is calling him right now and following up with  
3 an email but I [inaudible] a moment ago so hopefully we have  
4 an answer within a minute or so.

5 THE COURT: So let's talk about the other issues  
6 then. Is the deposition issue the only other issue we have at  
7 this point or -- I'm trying to remember what else there is.

8 MALE VOICE: I think that's it.

9 MALE VOICE: Some document discovery also.

10 THE COURT: What's the document discovery issue?

11 MALE VOICE: We had served a subpoena requesting  
12 documents and a deposition.

13 THE COURT: So is the documents related to the  
14 deposition?

15 MALE VOICE: Yes.

16 THE COURT: Okay. Well, as I said before when we  
17 first had a conference, I wasn't sure whether it would be  
18 necessary to take a deposition but I was going to allow any  
19 party that wanted to to depose a witness because it could  
20 make -- I think it's an opportunity that a party ought to have  
21 at this point. Science day is not an official event and --  
22 but again it could go a long way towards convincing Judge  
23 Weinstein or at least educating the court as to some of the  
24 issue and I wanted to give the parties the opportunity to take  
25 depositions if they thought it was reasonable. I don't think

1 it would be a waste of resources because it could in fact  
2 obviate the need for other kinds of depositions in the future.  
3 So I'm going to permit the deposition of the Marquette expert  
4 or witness. I take it the witness has not been clarified --  
5 isn't clarified whether he's a fact or an expert witness,  
6 correct? He's just a -- he's doing -- making a presentation  
7 at a forum for the court.

8 MALE VOICE: That's correct.

9 THE COURT: Is there any reason why it would matter  
10 procedurally at this point whether he is deemed an expert? We  
11 don't need to get into that, do we?

12 MALE VOICE: He's not -- he's definitely not this  
13 trial expert [inaudible] rules provide for reports and all  
14 [inaudible] designated as a trial expert. He's not.

15 THE COURT: No Rule 26(a) disclosure is necessary at  
16 this point.

17 MR. JOYCE: Right. If I may, Your Honor. This is  
18 Eamon Joyce for Kimberly-Clark. I don't think that  
19 distinction matters. We are seeking an expert report from  
20 him. The rule that plaintiffs relied on in their papers was  
21 26(b)(4)(D) which is the exemption from discovery for  
22 consulting experts.

23 THE COURT: Right.

24 MR. JOYCE: I just don't think that rule really lines  
25 up here where we know he is coming into court.

1 THE COURT: No, I agree. You don't need to argue  
2 that further. I thought about that and I agree at this point.  
3 I do understand plaintiff's position and there may be some  
4 collateral consequences to that down the line but at this  
5 point I don't see a problem.

6 MR. REICH: Your Honor, this is Mark Reich. Could we  
7 ask that there be coordination among the defendants or this  
8 sort of deposition perhaps where one firm is elected as the  
9 questioner so that the witness is not sitting through a full  
10 day deposition having repeated questions coming from three  
11 different parties?

12 MS. HENN: If I could address that, Your Honor.  
13 Defendants did notice the deposition and subpoena the witness  
14 for the same date with the idea in mind that we would  
15 coordinate. I do think we may want the ability to ask limited  
16 additional questions although there may well be one defense  
17 lawyer who takes the lead in the deposition. The companies  
18 that are involved in this hearing have different products and  
19 different interests and may have questions specific to their  
20 company or their product but we would certainly work to make  
21 it efficient and have no interest in asking repetitive  
22 questions or belaboring the deposition.

23 MR. BERGIN: This is James Bergin for Costco. We  
24 join in Ms. Henn's comments. I would just add that because  
25 the parties -- the defendant's technologies are different from



1 one another there may well be a need for individual questions.  
2 We would want the opportunity to do -- if there is a  
3 designated lead questioner to ask supplemental questions as  
4 well.

5 THE COURT: I understand that. That makes sense and  
6 I trust you to be -- to use your discretion and be reasonable.

7 Are you going to notice a deposition for a different  
8 date from the date you subpoenaed the witness now that the --  
9 well, actually it isn't that much additional time, is it? So  
10 I guess you are going to do it on the original date. Is that  
11 correct?

12 MR. REICH: This is Mark Reich, Your Honor. I'm  
13 hopeful that now that we know the court's position on this  
14 that plaintiff's counsel and defense counsel can coordinate a  
15 mutual convenient date for all.

16 THE COURT: Good. Is there --

17 MS. HENN: Your Honor, I wanted to mention while  
18 we're on the subject of depositions, to my knowledge  
19 defendants have not served a subpoena on Mr. Valet with the  
20 hearing fine [inaudible] scheduled in July. We may do that and  
21 I just wanted to raise that as a possibility. We've not done  
22 it yet and I don't think there's any dispute or anything to  
23 present to the court but since we're on the subject we wanted  
24 to mention that that is a possibility that Proctor & Gamble  
25 will seek a deposition of Mr. Valet as well.

1 THE COURT: Are there any of the defendant's  
2 witnesses who have not been questioned who might be subject to  
3 questioning deposition?

4 MR. REICH: Yes, there's one witness for Kimberly-  
5 Clark that has not sat for a deposition and we will as counsel  
6 for Kurtz -- this is Mark Reich speaking -- that we will work  
7 with counsel to Kimberly-Clark to discuss whether or not we  
8 need that deposition.

9 THE COURT: Okay.

10 MR. JOYCE: Can I raise two things. I can respond to  
11 that, Mr. Reich. First, we out of an abundance of caution  
12 disclosed the two witnesses not having done formal interviews  
13 with them and I can assure you that we're only going to call  
14 Mr. Powling at this hearing. So we have no intention to call  
15 Mr. Vogel and he's not going to be attending or what have you.  
16 So that's that piece of it.

17 In terms of building on Ms. Henn's comments on a  
18 potential deposition of Valet, from Kimberly-Clark's  
19 perspective one thing that could go a long way to clarifying  
20 at least from our side whether that's necessary is whether we  
21 could get a supplemental production from Valet or from Parsa.  
22 I know both plaintiffs subpoenaed -- and, Judge Levy, for your  
23 information, Parsa is Mr. Valet's employer. Back in December  
24 or January both plaintiffs subpoenaed Parsa and we received a  
25 Parsa production but obviously we've got five or six months

1 more of documents since then. So if there would be a way to  
2 supplement that Parsa production I think at least from my  
3 client's perspective we'd have a lot more information about  
4 whether a deposition was necessary.

5 MR. REICH: This is Mark Reich. If I could maybe  
6 respond to that. We'd try. I've been in contact with counsel  
7 for Parsa and perhaps an easy way to streamline is to make an  
8 introduction between Mr. Joyce and Parsa's counsel.

9 MR. JOYCE: Sounds fine to me.

10 MS. HENN: And for Proctor & Gamble I just wanted to  
11 mention that we have not received the Parsa production from  
12 earlier in the case and would just request that plaintiffs  
13 produce that to us. I don't know whether Parsa was subpoenaed  
14 by plaintiff in our case or not but regardless given now that  
15 he said Mr. Valet who works at Parsa is going to be a witness  
16 at science day we would request a copy of that production and  
17 any supplemental production.

18 THE COURT: So it sounds as though you're all in  
19 agreement on how to proceed with respect to discovery and the  
20 only question is Mr. Valet's availability. I take it he's --

21 MR. REICH: We got voice mail.

22 THE COURT: Okay. So why don't we come up with a  
23 back up plan just in case he's not available. Any other days  
24 the week of the -- that week in July that works? Ms. Henn,  
25 you can't do it on the Thursday.

1 MS. HENN: No. I think that week is relatively open  
2 for Proctor & Gamble. It was in August that we had the  
3 Thursday conflict.

4 THE COURT: It was. Okay.

5 MS. HENN: So the week of July 20th is open for us.

6 MR. JOYCE: Judge Levy, from Kimberly-Clark's  
7 perspective, I had only focused on the 21st insofar as it was  
8 the date that your law clerk had [inaudible] but we'd be  
9 amenable to the same arrangement that entire week where my co-  
10 counsel would cover the Valet side of things if he could  
11 appear that week.

12 THE COURT: Okay. So the 21st I know will work. If  
13 it doesn't then we have a backup date for everyone for the  
14 rest of that week then, correct, the 22nd, 23rd or 24th would  
15 work for everyone if necessary?

16 MR. LEVY: For Belfiore, yes.

17 MR. REICH: For Kurtz plaintiffs, yes.

18 MR. BERGIN: Costco, yes.

19 MS. HENN: For Proctor & Gamble, yes.

20 THE COURT: Is there anything else we need to  
21 discuss?

22 MR. REICH: While we do have Your Honor on the  
23 phone, perhaps we can get any guidance Your Honor may have in  
24 terms of procedure for bringing machinery or so on into the  
25 court. Do we need an order from the court in order to

1 accomplish that? Would that make things easier for security  
2 if they had an order from Your Honor?

3 THE COURT: I'm going to give you a contact person.  
4 You've been talking to Hannah Roth, my law clerk. R-O-T-H,  
5 Hannah first name, and just call her at 718-613-2344 and she  
6 will guide you through all the dark and shadowy corners of the  
7 courthouse to get you in.

8 MR. REICH: Thank you, Your Honor.

9 MR. BERGIN: Your Honor, this is Jim Bergin for  
10 Costco. In discussions amongst counsel regarding science day  
11 we have often come up against a question of how exactly will  
12 the format of the day go and will the court be asking  
13 questions, will counsel be permitted to ask questions? Do you  
14 know yet how -- what we should expect in the way of a format  
15 for the science day presentation?

16 THE COURT: I don't. Knowing Judge Weinstein I know  
17 that he will be asking a lot of questions. I'm guessing that  
18 questions by counsel will be permitted. So I'm going to  
19 suggest that you assume that unless we inform you otherwise  
20 and we'll check with Judge Weinstein's chambers to see if he  
21 has a different view but it seems to me that that's probably  
22 the way we will handle it.

23 But when you say questions, do you mean cross  
24 examination or how do you plan on doing that? Let me tell you  
25 actually what we did. When we had -- I organized a training

1 for -- I may have told you this. A training for our Storm  
2 Sandy mediation program that we had here and it was a training  
3 for lawyers and it was training by plaintiffs and defendants  
4 in those cases. We just had the experts speak and then we had  
5 the lawyers speak afterwards giving their perspective on what  
6 was seen rather than examining the witnesses and I found that  
7 that worked pretty well. We had a large audience of people.  
8 We had judges and counsel there and mediators and it seemed to  
9 work well.

10 Does anyone -- does that format sound like a  
11 reasonable one for you if that's what the court ultimately  
12 decides to do?

13 MR. JOYCE: From Kimberly-Clark's perspective that  
14 sounds fine to me. The only caveat I would say is sometimes  
15 my witness can slip into science speak and if I could have  
16 leave to prod him back into English from time to time.

17 THE COURT: Of course.

18 MR. JOYCE: But beyond that that sounds completely  
19 reasonable.

20 THE COURT: Does anybody have a problem with that?

21 MS. HENN: No, Your Honor. This is Emily for Proctor  
22 & Gamble.

23 MR. BERGIN: Your Honor, no problem with that from  
24 Costco.

25 THE COURT: And plaintiffs?

1           MR. REICH: I'm not sure how that would work. Are  
2 you saying the witness would take the stand and make a  
3 presentation without --

4           THE COURT: Yes.

5           MR. REICH: -- being directed by questioning,  
6 just --

7           THE COURT: I think you would ask -- well, we  
8 actually did it that way. It was one general question tell us  
9 what you want to tell us and the witness just went off and  
10 then I think the court or the parties basically or the  
11 mediators in that case asked some questions. So as I'm  
12 thinking of it more that my guess is that you could ask a  
13 couple of broad questions. If you thought that it was  
14 necessary to ask some more questions I'm sure you could do it  
15 to prompt the witness to discuss some issues that hadn't been  
16 discussed but I don't -- I didn't envision it as a direct  
17 examination of a witness but more of as an explanation.

18           MR. REICH: And no cross examination of the other  
19 party's witness?  
20 work

21           THE COURT: I didn't see that, no. That isn't how I  
22 was envisioning it. I do need to talk to Judge Weinstein  
23 about it. We haven't talked about it.

24           MR. REICH: And after the witnesses done then the  
25 attorneys can make a short presentation on their own?

1 THE COURT: Yes. That's how I see it.

2 MS. HENN: Your Honor, that process sounds good to us  
3 for Proctor & Gamble. I think it would be helpful to have  
4 clarification if that will be the process so we'll be properly  
5 prepared but it sounds like a useful process that would work  
6 for this hearing.

7 THE COURT: I will clarify that for you and either  
8 Hannah or I will get back to you in some way on that.

9 MS. HENN: Thank you, Your Honor.

10 THE COURT: So as soon as you hear about Mr. Valet  
11 please let me know and then otherwise we'll assume we have a  
12 hearing at -- on June 19th and I think -- did we say 10:30 on  
13 the 19th? I don't remember what we said. I don't think --

14 MR. REICH: I think that was the original setting.

15 THE COURT: So we'll go back to that setting. Then  
16 on the 21st, 10:30 again. Again, on the 12th of August for  
17 the class certification hearing 10:30. So it's 10:30 each one  
18 of those dates.

19 MS. HENN: Thank you, Your Honor. We very much  
20 appreciate the court accommodating the various schedules as  
21 difficult as it has been. Thank you.

22 THE COURT: Well, let me just say that you are the  
23 best organized conference call with multi parties that I've  
24 had in a long time. So I appreciate how you've conducted  
25 yourselves. So thank you.



1 MR. REICH: Thank you very much.

2 THE COURT: Have a nice weekend.

3 (Off the record at 3:07 p.m.)

4 (Back on the record at 3:09 p.m.)

5 THE COURT: So let's just make a list of what we need  
6 to discuss. So is this case going to turn on science  
7 ultimately?

8 MALE VOICE: You can answer that because you've been  
9 dealing more with the experts, Caroline.

10 FEMALE VOICE: I think -- I think it's going to be  
11 certainly a main aspect of the case. Whether the case turns  
12 on it or not it's a false advertising case. It's our  
13 contention that the products can't actually do the -- perform  
14 the efficacy results that are advertised. So in a sense it  
15 science will be a large part of the case. We have experts  
16 that we've been working with that have addressed even in this  
17 case have looked at certain aspects of the -- I don't know if  
18 they're formulas but the ingredients and the claims and they  
19 have analyzed to a small degree in preparation for the last  
20 round of briefing that we had on the motion, on the second  
21 motion to dismiss. Obviously we have two different viewpoints  
22 on the science so it's going to be one of the major issues.

23 THE COURT: Is the science something that the court  
24 is going to need to understand early on in the case or not?

25 FEMALE VOICE: I don't -- I don't think so. I

1 mean --

2           MALE VOICE: I think it's fair to say in terms of  
3 early on in the case for class cert certainly. The science I  
4 think is going to be shown to be uniform. The advertising is  
5 going to be shown to be uniform. So I mean to the extent  
6 that's going to be an issue it will be at trial or at summary  
7 judgment. I really don't think it's going to be an issue at  
8 class cert but obviously we're going to need to see the  
9 defendant's studies for documents and correspondence, speak to  
10 their witnesses to really get and understand that. For all I  
11 know they're going to say that the science isn't uniform which  
12 I've never heard before any of these cases but there's always  
13 a first time.

14           MALE VOICE: Your Honor, if I may. The big issue  
15 here for today from our point of view is whether this case is  
16 going to take three to four years because I think one or more  
17 of the lawyers sitting on the other side of the table are the  
18 plaintiff's lawyers, lead counsel in the case against Loreal  
19 in New Jersey, against Avon in the Southern District, and we  
20 monitor those docket sheets and these cases go on forever.

21           So what we're interested in -- when we talk about  
22 settlement, to me what we want is a schedule that will get us  
23 from Point A to Point B and if in the course of that we can  
24 get some work done and we can settle the cases, terrific. If  
25 we can't we can't but we don't want well, we're going to talk

1 settlement in six months so let's not do anything. We want to  
2 get this case with a tough deadline that we will try to meet  
3 although I've never known one where we've actually met it but  
4 if you don't actually set it you never meet it.

5           So the big difference we have with the plaintiffs on  
6 scheduling the things we need to do is let's look at the  
7 dates. Now, Adam -- Mr. Levin said earlier that -- I'm sorry,  
8 Adam said -- I know we're sitting here informally. So Adam  
9 said earlier they may want to move just to point out one of  
10 the issues. They may want to move for class certification  
11 early. Great. That's terrific. That's fine with us but the  
12 schedule they propose one day it could come out of the blue  
13 and then we have 60 days not only to take all their experts to  
14 get our papers in.

15           Now that to me is totally unfair. If it's at the  
16 end of discovery and both parties have agreed that we're not  
17 bifurcating discovery, fact discovery will be the same.  
18 Merits, damages and class issues because that's the efficient  
19 way to get things done given that with Comcast and the Second  
20 Circuit cases that have followed Comcast you got to know what  
21 your damage theory is. You have to see whether there's a  
22 class wide theory. To know that you've got to know sort of  
23 what the merits are all about.

24           So the big differences we have between us relate to  
25 those sort of details on the schedule. I don't really have a

1 problem with saying okay, defendants, you get your electronic  
2 discovery done by a certain date. Okay, that's fine. The  
3 question is really what happens afterwards. Why do we need a  
4 year before we start class discovery, the class briefing they  
5 say and then you follow that out it won't even be submitted to  
6 the court for a year and a half and then we go back and we  
7 start merits expert discovery.

8           So we're talking about without even an extension on  
9 our proposal two and a half years before we get somewhere. So  
10 those are really what we say as the issues today. Let's get  
11 working.

12           MALE VOICE: That's not really accurate, Your Honor,  
13 and I can explain why. In terms of two and a half years --  
14 and, first of all, I always find it interesting when an hourly  
15 lawyer is going to accuse a contingency lawyer of wanting to  
16 waste time. The last thing I want to do is waste time. We  
17 want to get to where we need to go. We want to bring this  
18 case to an effective and appropriate resolution and we're  
19 prepared to do that. The way that we structured this being  
20 down this road, and we've all been down this road a number of  
21 times, as Your Honor, this is nothing new. We think the way  
22 that we've structured our proposed schedule deals with the  
23 realities of these kinds of cases. We all see it -- as I said  
24 earlier, we all see again and again if there's simply a closed  
25 discovery date it seems that the last big production of

1 documents occurs on that date then all of a sudden we have to  
2 come back in and reopen the schedule.

3           So based on our experience in trying to deal with  
4 the practical realities for better or for worse what we've  
5 proposed here sets for a structure that prevents the moral  
6 hazard so to speak and forces everyone to do exactly what Ken  
7 is saying and that is keep us -- keep us moving forward as  
8 quickly as possible, get their documents, enable us to start  
9 taking the other side's deps. They'll depose our client and  
10 we'll see where we are relatively quickly.

11           So I think also in terms of class cert, and I'm not  
12 going to debate the other side's overstatement of Comcast or  
13 their overstatement the merits at class cert now, the fact is  
14 that if we're going to move for class cert before the close of  
15 discovery under AmJam we don't need the same level of expert  
16 work on class cert necessarily that we do at merits. So all  
17 I'm saying is that to the extent that we want to move for  
18 class earlier we should be allowed to do so. Frankly, Rule 23  
19 provides that we should move as soon as reasonably  
20 practicable.

21           The other sides wants to push it all the way at the  
22 end so I'm a little confused how on the one and they're saying  
23 they want to move as fast as possible and on the other hand  
24 they're saying let's push off a pivotal event until all the  
25 way at the end. So it's not really clear. I think that what

1 we proposed here makes more sense.

2 THE COURT: If class certification briefing were to  
3 take place, would other discovery continue at the same time?

4 MALE VOICE: Sure.

5 THE COURT: Or would it stop?

6 MALE VOICE: No. It would all keep going forward.

7 THE COURT: So let me just tell you my philosophy at  
8 least on how to manage these cases and also a settlement. I  
9 see settlement on a parallel track. You wouldn't slow down  
10 discovery at all and I think settlement is something that you  
11 have to think about at all phases of the case and I think it's  
12 something your clients need to be thinking about. You're all  
13 experienced litigators. I know you all think about it all the  
14 time so you don't need me to remind you of that. But it's  
15 something that's important to me to think about since so few  
16 cases actually are decided either at trial and often on  
17 motions.

18 As far as the case management goes, I think in the  
19 big cases I like a case management order that is -- that has  
20 [inaudible] and I like it -- we're going to do initial  
21 disclosures by such and such a date, we're going to have  
22 discovery, interrogatories, document requests, ESI, whatever  
23 on particular dates, responses on particular dates. I also  
24 like to have you in relatively frequently to make sure that  
25 you're on track. I don't want you to feel that I'm too far

1 away or too close but what I really want is to make sure that  
2 I'm here to make -- to untie the knots for the knots to have  
3 to take place.

4           So I will promise you that I will be available for  
5 discovery issues as long as you meet and confer and I would  
6 like to just get reasonable mile posts. I think setting dates  
7 for when motions are going to be filed is --

8 (Proceedings concluded at 3:18 p.m.)

9                               \* \* \* \* \*

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 I certify that the foregoing is a court transcript  
2 from an electronic sound recording of the proceedings in the  
3 above-entitled matter.

4 

5 \_\_\_\_\_  
6 Shari Riemer, CET-805

7 Dated: June 9, 2015  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25